No. 6644

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. HUGHSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

HARRY F. SULLIVAN,
Humboldt Bank Building, San Francisco,
Attorney for Appellant and Petitioner.

PERNAU WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Accord and satisfaction	1
Lack of consideration for bonds	4
Action on bonds distinct from action to collect tax	6
Hughson's compromise offer required no approval	8
Defense of accord and satisfaction not similar to defense of statute of limitations	10

Table of Authorities Cited

	Pages
Botany Worsted Mills v. U. S., 278 U. S. 282	8
Revenue Act of 1928, Section 606	7, 8, 9
Roberts Sash & Door Company v. U. S., 282 U. S. 812	4, 5
U. S. v. John Barth Company, 279 U. S. 370	4, 6, 7, 9

No. 6644

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. HUGHSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

William L. Hughson respectfully requests that this Honorable Court grant him a rehearing in the above entitled action, and bases such petition upon the grounds hereinafter set forth:

ACCORD AND SATISFACTION.

In view of the announcement by the Court, in its decision in this case, of an entirely novel theory of law, a theory entirely unsupported by any authorities, we respectfully, but honestly and earnestly, disagree with this Honorable Court, and feel that an opportunity should be afforded us to reconsider, with this

Court, on a rehearing, the question of whether the Federal Government should, or should not, be released from the operation and legal effect of the well known and definitely established doctrine of accord and satisfaction.

This Court, in considering the defense of accord and satisfaction interposed by Hughson, makes, in its decision, the statement that "the Collector who received the check had no authority to compromise the claim against the appellant by express agreement, much less by implication."

The statement just quoted is not fair to appellant Hughson, nor is it an accurate statement of the facts regarding the check. We believe that this matter should be reconsidered by the Court, and for that purpose, we now call the Court's attention to a statement of all of the facts in connection with the offer of compromise, Defendant's Exhibit No. 3. (Transcript p. 92.)

The record in this case (Transcript p. 95), unmistakeably indicates that the General Counsel for the Commissioner of Internal Revenue, on January 8th, 1930, requested Harry F. Sullivan, as attorney for William L. Houghson to take some definite action in the matter of settling Hughson's liability involved on these bonds. The record further shows (Transcript p. 96), that in response to the letter just mentioned, and on January 15th, 1930, said Sullivan forwarded to the General Counsel for the Commissioner of Internal Revenue a letter and offer of compromise and a check for $100.00.

This check as the record shows (Transcript p. 62), was payable, not to the Collector of Internal Revenue, but to the Commissioner of Internal Revenue. This check was endorsed by the Commissioner of Internal Revenue to whom it was payable, and thereafter, as it appears by the check itself, was endorsed by the Collector of Internal Revenue and by the Federal Reserve Bank. The money covered by that check unquestionably found its way into the United States Treasury.

At no time has appellant Hughson, or his Counsel, claimed that this one hundred (100) dollars was paid to the Collector of Internal Revenue by Hughson, but we do claim, and insist very earnestly upon our claims, that the check was payable to the Commissioner of Internal Revenue to whom the offer of compromise was submitted, as per request, and that the money finally found its way into the United States Treasury. We further insist, and the facts clearly support our contention, that there is no evidence in this record, because none exists, that either the Commissioner of Internal Revenue, or the General Counsel for the Commissioner, ever advised or notified either Sullivan or Hughson, of the rejection or acceptance, either qualified or absolute, of the offer of compromise.

Had Hughson merely given his check to the Collector of Internal Revenue at San Francisco, we would not now have the temerity to advance the theory that the Collector had authority to receive that check with an offer of compromise, and to act upon it.

The endorsement of Hughson's check by the Commissioner of Internal Revenue, and the deposit of the

funds represented by said check in the Treasury of the United States, constitutes, under the authorities, an acceptance of the $100.00 sent by Hughson, without any conditions being attached to its acceptance, other than those set forth in the offer of compromise of January 15th, 1930, together with Sullivan's letter which accompanied it. The unconditional acceptance by the Commissioner of the $100.00 from Hughson, and the acquiescence by the Secretary of the Treasury in allowing said $100.00 to go into the Treasury of the United States, unquestionably brings into full force and operation, the doctrine of accord and satisfaction, which is a perfect defense to the four causes of action set forth in the complaint on file in this action.

We likewise earnestly insist that the purported offer of February 4th, 1930, Plaintiff's Exhibit No. 2 (Transcript p. 71) is entitled to no consideration whatsoever by this Court in passing upon the points involved in a correct decision of this case. There is in the decision of this Court the entire absence of any comment on the variance between Plaintiff's Exhibit No. 2 and Defendant's Exhibit No. 3. (Transcript p. 92.)

LACK OF CONSIDERATION FOR BONDS.

The Court, in considering the question of lack, or failure of consideration for the execution of the bonds in suit, which was one of the defenses urged by Hughson in this action, bases that part or portion of its decision upon the decisions of the United States Supreme Court in the case of *Roberts Sash & Door*

Company v. U. S., 282 U. S. 812, and the *U. S. v. John Barth Company,* 279 U. S. 370.

The *Roberts* case (supra) was not an action brought by the Government seeking a recovery upon bonds, but was an action brought by the taxpayer to recover taxes actually paid, and collected after the Statute of Limitations had commenced to run. The question of the validity of the bonds was not before the Court for decision.

The *Barth* case (supra) involved solely the question as to whether or not a Statute of Limitations, which prevented the commencement of an action by the Government, for the collection of taxes was, or was not, applicable in an action brought by the Government, on a bond given by the taxpayer, for the express purpose of preventing the running of the Statute of Limitations. This case is not authority to the effect that any Statute of Limitations may, or may not be applicable in an action by the Government seeking recovery on bonds. The decision goes merely to the extent of determining that a particular Statute of Limitations, which might bar collection of taxes in a suit brought for that specific purpose, cannot be extended by implication, to a proceeding commenced by the Government directly on the bonds. The decision expressly provides that the execution and giving of the bonds gives the Government a separate and distinct cause of action, from an action to collect taxes.

ACTION UPON BONDS DISTINCT AND SEPARATE FROM ACTION FOR COLLECTION OF TAX.

And while discussing the *Barth* case (supra), we desire to call the attention of the Court to a particular statement in the decision in that case which should have great weight with this Court in granting a rehearing and in ultimately changing its decision herein.

The United States Supreme Court in the *Barth* case says "the object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government."

Regarding the question of the running of the Statute of Limitations, we respectfully call this Court's attention to the fact that under the Revenue Act of 1924, which was the act in effect at the time the assessments were levied against Hader for these taxes, and under Section 278, Subdivision D of that Act, the Commissioner had six years after the assessment of the taxes within which to take direct action against the taxpayer. The assessment of these deficiency taxes against Hader was made by the Commissioner on May 14th, 1925. (Transcript p. 68.) The Commissioner therefore would not be barred by the Statute of Limitations until after the 14th of May, 1931.

Hughson's offer to compromise, Defendant's Exhibit No. 3 (Transcript p. 92), was made upon the 15th of January, 1930, and this action against Hughson on the bonds, was commenced on January 7th, 1931. Even at the time of the commencement of this action there still remained more than four months of that six year period within which the Commissioner

might have proceeded directly against Hader for the collection of these taxes.

The settlement of Hughson's liability on the bonds could not legally, in any way, have affected the right of the Commissioner to proceed against Hader, as it plainly appears as a matter of law, from the decision in the *Barth* case (supra), that the liability on such bonds is absolutely separate and distinct from the tax liability referred to in said bonds.

U. S. v. John Barth Co., 279 U. S. 370.

This is not one of that type of cases in which, due to an act of a surety in giving a bond, the Commissioner has lost his right to proceed against the taxpayer for the collection of the taxes.

This Honorable Court, in arriving at its decision in this case, evidently had in mind that the case was covered by the provisions of Section 606 of the Revenue Act of 1928, which Section 606 reads as follows:

> "(a) Authorization. The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.
>
> (b) Finality of agreements. If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except

upon a showing of fraud or malfeasance, or misrepresentation of a material fact— * * *."

HUGHSON'S COMPROMISE OFFER DID NOT REQUIRE APPROVAL BY SECRETARY OF TREASURY.

The acceptance by the Commissioner of Internal Revenue of Hughson's offer to compromise his liability as a surety on these bonds was not a closing agreement, or an offer to make a closing agreement such as is contemplated by the provisions of Section 606 of the Revenue Act of 1928, because upon the settlement with Hughson of his liability upon these bonds, the Government still had a right to proceed against Hader on his tax liability, which illustrates, quite clearly, that the settlement which Hughson sought was not a final closing agreement such as is contemplated by the above cited Section.

In support of its decision on this point, this Honorable Court relies upon the case of *Botany Worsted Mills v. U. S.*, 278 U. S. 282. We feel quite sure that this Court, upon reconsideration of the opinion in that case, will conclude as we have, that the Court, in the *Botany Worsted Mills* case was dealing with a purported closing agreement such as is contemplated in Section 606 of the Revenue Act of 1928, which agreement was made directly with the taxpayer. The Hughson case, now before the Court, as we just said in the preceding paragraph, does not involve a closing agreement between a taxpayer and the Government, and it is not an action in which any claim is advanced,

that a closing agreement was made or offered to be concluded, between a taxpayer and the Government as provided in Section 606. Hughson merely made an offer of compromise of a separate and distinct liability which is recognizzed and established by the United States Supreme Court in the *Barth* case.

U. S. v. John Barth Co., 279 U. S. 370.

The Hughson case now before the Court, as we just noted in the preceding paragraph, is not an action between the taxpayer and the Government involving the nonpayment of taxes, and is not an action in which any claim is advanced that a closing agreement was made or offered to be made between the Government and the taxpayer, regarding that tax, which is the agreement contemplated in Section 606 of the Revenue Act of 1928. In the case at bar, the admitted facts are that Hughson made an offer to compromise a contract liability entirely separate and distinct from the tax liability of Hader to the Federal Government. The distinction between this contract liability on a bond and the tax liability against the taxpayer is clearly recognized by the United States Supreme Court in the *Barth* case.

U. S. v. John Barth Co., 279 U. S. 370.

DEFENSE OF ACCORD AND SATISFACTION IS NOT SIMILAR TO DEFENSE OF STATUTE OF LIMITATIONS.

We respectfully insist that the United States has not, nor have the Courts, any right or authority, unless specifically so permitted, to abrogate such a well acknowledged and firmly established principle of law as that embraced in the title "accord and satisfaction."

We are not unmindful of the fact that a citizen defendant in an action brought by the United States in an attempt to enforce a sovereign right such as the collection of taxes, cannot successfully interpose the defense of the Statute of Limitations unless positively so authorized by statute.

This principle is just as well known and established as that of accord and satisfaction; but a citizen defendant is not deprived of his right to interpose the defense of the Statute of Limitations in an ordinary action on contract. He is only deprived of this right of defense in a case between him and the Government involving sovereign rights. This action is not one involving sovereign rights, but is simply and solely an action on contract between the Government on one side, and Hughson on the other, because of his execution of these four bonds as a surety. No rights as a sovereign were acquired by the Government, as against Hughson, by reason of his execution of these four bonds as a surety.

In conclusion, we respectfully, but earnestly insist that serious injustice will be done to the appellant in this proceeding, unless the Court in the execution of

its sound judicial discretion, sees fit to grant a rehearing on the points herein set forth.

Dated, San Francisco,
June 18, 1932.

HARRY F. SULLIVAN,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I, Harry F. Sullivan, attorney at law, duly licensed to practice as such in all the Courts of the State of California, and in the above entitled Court, hereby respectfully certify that I am the attorney for William L. Hughson, the appellant and petitioner herein, that I have prepared and read the foregoing petition for a rehearing, and that, in my judgment, the counts therein set forth are well founded, and that said petition is not interposed for the purpose of delay.

Dated, San Francisco,
June 18, 1932.

Respectfully submitted,
HARRY F. SULLIVAN,
Attorney for Appellant and Petitioner.